

When the Inquisitorial and Adversary Systems Collide: Teaching Trial Advocacy to Latin American Lawyers

Leonard L. Cavise¹

Introduction

One of the more dramatic international legal developments of the last generation has been the conversion of the legal systems of most of the countries in Latin America from the inquisitorial model to the accusatorial model for the preparation and trial of both civil and criminal cases². A trial in Latin America conducted under a loose interpretation of the inquisitorial or European model has traditionally been little more than an exercise in the reading of long affidavits by victims and witnesses, certifications of various police and other official records and a decision by the judge. For the parties

¹Professor of Law, DePaul University College of Law

²Dakolias, A Strategy for Judicial Reform: The Experience in Latin America, 36 Virginia Journal of International Law 167 (Fall, 1995); Tarigo, Legal Reform in Uruguay: General Code of Procedure, in Judicial Reform in Latin American and the Caribbean (Rowat, Malik, Dakolias, eds. the World Bank (1996); See generally Tiede, Lydia B. *Committing to Justice: An Analysis of Criminal Law Reforms in Chile*, eScholarship Repository, University of California. <http://repositories.cdlib.org/cilas/papers/224>. Pp. 7, fn.15; Jonathan L Hafetz, *Pretrial Detention, Human Rights, and Judicial Reform in Latin America*, 26 Fordham Int'l L.J. 1754 (2003). See also U.S.AID reports. *Achievements in Building and Maintaining the Rule of Law: MSI's Studies in LAC, E&E, AFR, and ANE* Nov. 2002. Occasional Papers Series. Office of Democracy and Governance. Bureau for Democracy, Conflict, and Humanitarian Assistance. http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr220.pdf. Argentina adopted the accusatorial system for federal criminal procedure in 1989; Peru followed in codifications in both 1991 and 1994; Guatemala's new code was enacted in 1994; El Salvador and Venezuela introduced the party system codes in 1998; Chile's reform process spanned from 1997 to 2000 and Costa Rica's from 1996-1998; Bolivia and Paraguay were both in 1999; Ecuador was in 2000; Honduras was in 2002; and Chile will conclude the reform process in 2005.

to give live testimony was a rare occurrence which, when it happened, would then be almost totally controlled by the judge. The investigation and preparatory stage was equally dominated by the judge.³ The role of the lawyers for the parties at trial was confined almost exclusively to legal argumentation.⁴ The conversion to the accusatorial or so-called American party model has been effectuated by reform projects in a large number of countries, followed by statutory enactments, often of entirely new procedural codes. This statutory reform establishes the new foundation to which the Latin lawyer must now adapt. What remains beyond that is for those lawyers to develop the necessary expertise in practice skills to implement that reform.

The purpose of this article is to examine the reactions of Latin American litigators to some of the major differences in trial procedures between the inquisitorial model and the party model. The context for the observations was a series of projects spanning a decade whose objective was to teach attorneys steeped in the inquisitorial to transition to the accusatorial. During the course of the projects, the participants found that the procedural differences are substantial. Certain of those differences gave the participants reason to pause and question the utility and efficacy of some of the accusatorial trial procedures which American litigators have long accepted as the correct way in which to proceed. This article will review only those changes which caused the Latin lawyers the greatest degree of upset. The challenge to the existing

³See discussion, *infra*, of the official role of the public prosecutor during the pretrial phase of some national systems.

⁴Diehm, James W. The Introduction of Jury Trials and Adversarial Elements into the Former Soviet Union and Other Adversarial Countries. 11 J. Of Transactional Law and Policy 1, pp. 5-8.

trial culture, as they understood it, combined with the sometimes difficult learning curve of the various American-model trial competencies, induced reluctance if not outright rejection of aspects of the accusatorial model.

The focus of the article is on Latin America, first, because the author's experience is centered in those countries but also because the wholesale abandonment of the inquisitorial model in most of the countries of Central and South America represents a seismic shift in the international legal landscape which will have implications far beyond statutory reform.

The first part of this article will review the author's experience in teaching trial competencies to Latin lawyers through this series of both short and long term transition projects. The second part will describe in very basic fashion the fundamental differences in the two models, so as to highlight the reasons for the difficulties encountered in teaching oral practice or *oralidad*.⁵ The third part will review those trial skills that were greeted by the Latin lawyers with reluctance, suspicion or outright criticism. Finally, though it is very much too early to assess the success of the transition, several ideas for the future are offered to ease the process of change.

⁵Though the U.S. system has come to be used interchangeably with "the oral system," American pleadings, briefs and memoranda in support of motions are invariably in writing. The inquisitorial system, as least as adapted in Latin America, is referred to as the "written system," not only because of the multiplicity of written pleadings and reports but also because there has traditionally been great emphasis on formality, with each stage of the process being reduced to writing and "sewn together" with other "writings" in the case. The judge then assumes the role of reviewing the often enormous quantity of writings and then of coming to conclusions based upon the written record. Some scholars suggest that the two models are distinguished not so much by the volume of the written record but by the fact that, under the party model, there is actually a hearing or series of hearings at which oral testimony is adduced. See Martha A. Field and William W. Fisher III, *Legal Reform in Central America*, Harvard (2001), p. 22,23.

Background

For fifteen years, it has been the author's privilege to train lawyers and judges from various parts of the world in a wide variety of lawyering skills.⁶ Lawyers and judges from Poland, Ukraine, Morocco, Algeria, Tunisia, Egypt, Macao, Palestine, Palestine, Spain, Italy and, in particular, much of Central and South America have participated with the author in projects designed to compare law or train non-American lawyers in various trial competencies. Each program is custom-built, depending on the competency training sought or the focus of the grant under which the training was conducted. Substantive law programs have run the gamut from teaching the various international instruments relevant to practice, to doctrinal areas such as U.S. juvenile law, criminal law and procedure, the rules of evidence and, in the case of the Palestinian judges program, a judicial code of ethics. In addition, the author has escorted seven groups of law students to the Mexican state of Chiapas to work in local human rights legal offices, primarily on issues affecting the indigenous population.⁷

The focus here is on the teaching of trial advocacy, in particular, to lawyers from Mexico, Guatemala, Costa Rica, El Salvador, Honduras, and Venezuela. In discussion with colleagues from other countries, particularly those European countries that are also

⁶The author has a trial lawyer background and over twenty years experience in teaching evidence, litigation, trial skills, criminal law and procedure at DePaul and other universities, as well as with the National Institute for Trial Advocacy (NITA) and several other agencies or judicial training programs.

⁷The leading human rights legal office in Chiapas is the Fray Bartolomé de Las Casas Human Rights Center whose publications can be accessed at <http://www.laneta.apc.org/cdhbcasas/Ingles>. Information about the DePaul College of Law program can be accessed at <http://law.depaul.edu/programs>.

in the process of transition, such as Italy, it is clear that the concerns of the Latin lawyers were very similar to those of the Europeans, with cross-examination, plea-bargaining, and the jury system provoking the greatest suspicion of the model.

Most of the projects described focused on *oralidad*. The projects¹¹ emanated from a wide variety of funding sources, including U.S. Government agencies. Project length would vary from one week to three months. The number of participants would vary. While it was uncommon to have a trial training project of more than 20 participants, it sometimes happened that the sessions would be opened to a wider audience of students or professionals who, though not actually participating, were interested in the proceedings. This was the case at almost all university-connected projects and also with the Judicial Council in Venezuela.

Under rubrics such as Human Rights, Rule of Law, or Sustainable Democracy development, various government, non-government and international organizations and agencies developed action plans including private sector lawyers for projects ranging from judicial reform to court management to training skills programs. These initiatives, and the *oralidad* training in particular, from the United Nations,¹² U.S. State

¹¹There were three primary funding sources for the projects. The largest percentage of sponsorship came from agencies working with the United States Agency for International Development (USAID) on legal reform. See Margaret J. Sarles, "USAID's Support of Justice Reform in Latin America," pp. 47-69, in *Rule of Law in Latin America: the International Promotion of Judicial Reform*, Pilar Domingo and Rachel Sieder, eds. Institute of Latin American Studies, 2001. Other projects were funded, through grantee organizations, by the International Labor Organization, the Public Affairs Department of the U.S. Department of State, or by the Latin Universities and Consejos themselves.

¹²For example, the International Training Programme on the Criminal Justice System Reforms in Latin America (ILANUD). See <http://www.ilanud.or.cr/justiciapenal>

Department, the U.S. Agency for International Development (USAID), the World Bank¹³ and others became standard components of literally hundreds of reform proposals offered to the private sector for implementation.¹⁴

Though the climate of distrust of the United States is today much stronger, there was, even then, substantial question among the participants as to whether the course content had been dictated or screened by any U.S. government funder. The question was also raised as to whether the participants themselves had been chosen by some unstated political criteria with an expectation that their future work would somehow serve U.S. interests. These are impossible questions to answer without access to the internal deliberations of the agency in question. It is, however, possible to state categorically that at no time was there ever any attempt or even suggestion to influence the content of the course, the content of the author's teaching, or any other aspect of the author's participation or perspective, political or otherwise. As to the participants, it can only be stated with certainty, from this vantage point, that there was a wide variety of political perspectives within the various groups and that the discussions were completely politically uninhibited. This is not to imply that one didn't notice, from time to time, that a lawyer participant might defer or hesitate to confront a judge participant from the same country¹⁵ and that, as a result, the dynamic might not have been quite as

¹³See generally, Webb, Legal and Institutional Reform Strategy and Implementation: A World Bank Perspective, 30 Law and Policy in International Business 161 (Winter 1999).

¹⁴For a description of the efforts of international organizations in the area of judicial reform, see *Justice Delayed/Judicial Reform in Latin America* (Jarquin and Carrillo, eds) John Hopkins University Press, 1998

¹⁵Most groups were composed either of lawyers or judges but, in at least one case, the participants were mixed. Most of the lawyer groups were composed, in the criminal context,

robust as it might have been, but that is not a restraint placed upon the groups by the funders.

USAID, as the largest funder of these and similar projects world-wide, plays a diverse role internationally.¹⁶ While it may, in one locale, serve as the on-the-ground face of U.S. government policy, it may, in another location, operate to improve domestic systems, from the sewers and water filtration to the law schools and the legal system. In the case of Latin America, it seems clear that the impetus for the various U.S. government programs in the Rule of Law area, is to develop a stable, predictable and overhauled legal system in target Latin countries. From the perspective of U.S. foreign policy, perhaps those improvements will encourage U.S. multinationals to see the particular environment as safe or at least more predictable for business in a developing “free trade” era.¹⁷ By the same token, that “democratization” or, better put, that reconfiguration of the courts to mirror U.S. practice, will, concomitantly, help the Latin lawyers to become better litigators in their own right and to do battle in their own courts

more of public defenders than prosecutors. Civil lawyers tend, in Latin America, to have a very general practice.

¹⁶Other projects focused on the widespread corruption and racketeering that is considered endemic to many of legal systems. Legal reform project packages, at least those of USAID, usually include technical assistance including curricular reform for the law schools, establishment of masters programs in the law schools, updating of physical plant, library materials and computer labs, upgrading of administrative support services. For a description of the USAID action plan for Rule of Law in Guatemala, see Steven E. Hendrix, *Restructuring Legal Education in Guatemala: A Model for Law School Reform in Latin America?*, 54 J.Legal.Educ. 597 (2004).

¹⁷See generally Garcia Gonzalez, Symposium: The Role of Legal Institutions in the Economic Development of the Americas, 30 Law and Policy in International Business 11 (Winter 1999)

on an even footing with all parties. For lawyers who had never seen themselves as having any real control over the presentation and development of the investigation and trial, this change represents a true revolution in the potential for all lawyers to serve their own communities as legal advocates rather than, as has always been the case, to simply bow to the authorized stake-holders and weakly add collateral pieces of argument or evidence which the court may or may not even acknowledge or take into consideration.

The author's role was in the development of trial skills among the lawyers of the various Latin countries. Though the transition to *oralidad* posed the greatest challenge, the transfer of power from the judge to the lawyers in the presentation of the case requires a very substantial retooling for judges, prosecutors, defense lawyers and civil litigants. The author's personal motivation was to help see that those lawyers who previously had little access to the key decisions of the trial system could now litigate as lawyers trained to do battle in ways previously unknown—lawyers in control of the case, with the ability to conduct competent witness examinations, with the imagination to present a variety of forms of evidence, to make legal arguments based upon the facts as developed right there in the courtroom, with the ability to object to unreliable or inadmissible evidence, and unafraid to exercise the right to disagree with the trial judge. These changes will eventually not only change the lives of their clients but will also change the entire legal culture of the country.

The Inquisitorial Model

The European and American trial systems are the products of two very different

procedural cultures. The European system,⁰ itself experiencing major reform initiatives,²⁰ has traditionally reduced the trial phase to a mere formality due primarily to the role of the judge. In the investigatory phase, the judge of the investigation (the *juge d'instruction* in the French system, often cited as the quintessential example of an unreformed European model) is normally in charge of the investigation and collection of the evidence, with the goal of determining if a crime was committed and, if so, by whom.²¹ The judge is, in fact, expected to thoroughly pursue the investigation to its evidentiary conclusion before the case is turned over either to the public prosecutor or another judge to enter the trial phase. The investigative judge does so in closed proceedings, and without the benefit of counsel representing the parties. If there is live testimony by a witness, it is usually before a clerk who writes the testimony down in the form of a statement and later presents it to the judge, without any cross-examination, along with the entirety of the investigative file.²² The proceedings are characterized as

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²⁰See Linarelli and Herzog, *Model Practices in Judicial Reform: A Report on Experiences Outside the Region*, Justice Beyond our Borders, (Biebesheimer and Mejia, eds.) Johns Hopkins Press, 2000; see also U.S. AID reports, *Achievements in Building and Maintaining the Rule of Law: MSI's Studies in LAC, E&E, AFR, and ANE* Nov. 2002. Occasional Papers Series. Office of Democracy and Governance. Bureau for Democracy, Conflict, and Humanitarian Assistance. [Http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr220.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr220.pdf). It should also be noted that the Austrian-German oral preliminary hearing reforms have served as a model, at least, to the Spanish in the reform of their civil code. Some commentators feel that the Austrian-German model may be of greater utility than emulation of the U.S. model. See Fisher and Field III, note 5, p. 51.

²¹Ennio Amodio, *The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy*, 52 Am.J.Comparative Law, 489 (2004) (tracing the role of the *juge d'instruction* in the French system to its Italian analogue, the *giudice istruttore*).

²²Marsha A. Field and William W. Fisher III, *supra* note 5, p. 22.

“nonadversarial” because each of the participants in this phase is independent, whether they be appointed *rapporteurs* or judges.²³

Because of the judge’s dominant role in the development of the case and the importance of the investigatory judge’s findings, the trial phase (*primera instancia*) became merely a confirmation of the findings of the investigation and, therefore, the principle of orality was of little utility.²⁴ Should actual testimony be taken, it is normally the judge who would call the witness and conduct the examination whereas, in the adversarial system, any such active questioning by a judge is viewed as a challenge to the party attorneys and is looked at askance by courts of appeal.

The criminal prosecutor, in the inquisitorial system, often is seen as an “official” of the state or the executive branch whose role is not to get a conviction but rather to seek the truth and to make conclusions independently from the judge.²⁵ The prosecutor, in the inquisitorial model, usually makes his/her initial appearance on the scene much earlier than any defense lawyer. As a result, the criminal defense lawyer

²³ This is not to imply that there is no conflict in the positions taken during the investigation. Should a French citizen, for example, file a civil or criminal complaint, the court system, through the *juge d’instruction* and the *rapporteur* take over the case. An independent commissioner of the government may provide the court with a separate and independent recommendation, as will the counsel for the parties. The debate, however, is usually internal and in writing, though there is provision (sometimes seldom-invoked) in many European inquisitorial systems for the appointment of a jury. Wright, Charles A. And Koch, Charles H. Jr., *Federal Practice & Procedure, Judicial Review of Administrative Action*, Ch.2, Sources of Administrative Procedure Sec. 8124, Procedural Alternatives. See also, Diehm, James W. , *supra*, note 4, p. 8

²⁴ *Id.* at p. 26

²⁵ For a full discussion of the role of the prosecutor, see Philip B. Heymann, *Should Latin American Prosecutors be Independent of the Executive in Prosecuting Government Abuses?*, 26 U.Miami Inter-Am. L. Rev. 535 (1995).

and the client are seldom full participants in the process. They arrive late to the proceedings and their right to confront and present evidence exists only insofar as the judge chooses to pursue the right. Even under the new party model, many Latin American countries have opted to give the prosecution control of the investigation phase, leaving defense counsel to protest at the door or exercise extraordinary initiative to embark on a defense investigation.²⁶

Latin-American adaptations of the European model have been generally faithful to the most important elements of the Continental tradition. To gain a basic understanding of the Latin trial procedural codes, it must also be understood that Constitutional rights in most Latin American countries have been codified along with the principal structural components of the legal system, including individual rights, into the national Constitution. Most countries separate powers into the executive, legislative, and judicial. Because funding for the judiciary usually depends upon the executive or the legislature and because appointment to the bench is often used as a political reward, the judiciary is usually the most compromised of the three branches, leading to a highly partisan administration of justice²⁷ where political manipulation and administrative and budgetary neglect are endemic.²⁸ The basic human rights included

²⁶Maximo Langer, *From Legal Transplants to Legal Translations: the Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l. L.J. 1, 27 (2004).

²⁷Laura Nuzzi O'Shaughnessy and Michael Dodson, *Political Bargaining and Democratic Transitions: A Comparison of Nicaragua and El Salvador*, 31 Journal of Latin American Studies 7, (1999).

²⁸Dakolias, *supra*, note 2; Buscaglia and Dakolias, *An Analysis of the Causes of Corruption in the Judiciary*, 30 Law and Policy in International Business 95 (Winter 1999); For

in the Constitutions include free speech, presumption of innocence, the right against self-incrimination, the right to counsel, prohibitions against lengthy detentions without trial, and due process.²⁹ As in most systems, the gap between Constitutional theory and practice is substantial.

Most of the Latin American legal systems are also code-based, with case precedent either non-existent or playing a distinctly collateral role in the process.³⁰ That tradition is firmly entrenched and is not expected to change under the party model. This reality, of necessity, requires that new codes be thorough, comprehensive and extremely well-drafted so as to include or at least contemplate every conceivable procedural problem. Otherwise, there is little hope of uniform application of the laws or the procedure even within national boundaries. In those countries with a large indigenous population,³¹ “customary” law will often conflict with national legislation,

the Mexican example, see Yamin and Noriega Garcia, *The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, Loy.L.A.Int'l & Comp. L.J. 467 (1999). See also Mendez, Juan E., “Institutional Reform, Including Access to Justice: Introduction,” p. 222, in *The (Un)Rule of Law and the Underprivileged in Latin America*, Mendez, Juan E., O'Donnell Guillermo, and Pinheiro, Paulo Sergio, eds., Notre Dame Press, 1999.

²⁹U.S.AID Reports: *Achievements in Building and Maintaining the Rule of Law: MSI's Studies in LAC, E&E,AFR, and ANE*, Nov. 2002. Occasional papers Series, Office of Democracy and Governance. Bureau for Democracy, Conflict, and Humanitarian Assistance. [Http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr220.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr220.pdf).; See also Steven E. Hendrix, *Innovation in Criminal Procedure in Latin America: Guatemala's Conversion to the Adversarial System*, 5 Sw.J.L. & Trade Am. 365 (1998).

³⁰Diehm, *supra*, note 4, pp.8-9. See also Martha Field and William Fisher III, *supra*, note 5, p. 48.

³¹*Commentaries on Raidza Torres, The rights of Indigenous Populations: The Emerging International Norm*, 16 Yale J. Int'l. L. 127 (1991). The universally-cited convention No. 169 of the International Labor Organization [cite] has been broadly ratified by Latin American states.

leading to a number of codifications of indigenous law. Aside from the universally recognized Supreme Court, most of the countries, consistent with the European model, also have a Constitutional Court (*Corte Constitucional*) which reviews matters of Consitutionality in actions against the federal government or even the Supreme Court. Other specialized courts such as Electoral Tribunals, Juvenile Courts, Military courts, or Courts of Human Rights may also exist.

The inquisitorial model as adapted to the various Latin systems has retained the fundamental European characteristics but with a number of culturally or politically-dictated modifications in each Latin-American national system. Most importantly to the subject here, the process, before the transition, was shrouded in secrecy and was almost completely in writing.³² The judge's investigative work, produced in what was called a *sumario*, often took years while a criminal defendant waited in jail or the civil parties went uncompensated. Just as there is little judicial oversight of the police, there has been traditionally even less oversight of the work of the judiciary. In Mexico, for example, it is common for the Judge's secretary to oversee case investigation and development, including the statement of the defendant, while judges themselves seldom appear.³³ The role of counsel, even where the codes stipulate that counsel should be appointed, is minimal until well into the investigation phase and normally not

Convention 169 sets forth guarantees of the collective rights of the indigenous, rights to their ancestral communal lands, cultural development, and economic and social development.

³²Tiede, Lydia B. Committing to Justice: An Analysis of Criminal Law Reforms in Chile, eScholarship Repository, University of California, <http://repositories.cdlib.org/cilas/papers/224>, pp. 7, fn. 15. See also Martha A. Field and William W. FisherIII, *supra*, note 5, p. 23.

³³Special Report: *Presumed Guilty? Criminal Justice and Human Rights in Mexico*, 24 Fordham Int'l. L.J. 801, 831 (2001).

until the defendant, in the criminal case, has at least made a statement.³⁴

It is undeniable that the judge, not the litigants, has been in charge during the preliminary and the trial stage.³⁵ Only after the investigation did the attorneys for the parties take a more active role which, at that, was confined to written pleadings.³⁶ The perception of arbitrariness, the insulation of the judicial elite, the “stultifying formalism” that “throws the facts of life out of court.”³⁷ and the desire for legitimacy have fueled many of these changes toward the party system.

The Lawyers and Judges

The body of experience from which this article is drawn consists of over fifteen groups of lawyers and judges from Latin America whose participation in these projects was focused on learning the basics of trial advocacy skills. The first group consisted of 14 “human rights” lawyers, mostly from El Salvador, who spent three months in Chicago trying to learn the accusatorial or party system. The “human rights” theme of the group was aspirational. Most of the lawyers were either academics who were practicing law, along with several public defenders. That project was followed by seven programs for Guatemalan lawyers who, over the next three years, came to DePaul for shorter but more intense trainings. These groups consisted mainly of sitting judges,³⁸ public

³⁴*Id.* at 844.

³⁵In Guatemala, there was a *fase intermedia*, roughly equivalent to a probable cause phase which occurred between the investigation and the trial. That phase remains under the new law. See Hendrix, *supra*, note 29, p. 394.

³⁶*Id.*, pp. 10,11

³⁷Mendez, *supra*, note 28, p. 222

³⁸For an overview of the USAID judicial training programs in Latin America, see Linn

defenders, prosecutors and a few academics. The last group brought to Chicago specifically for trial skills training was part of what was called an Inter-American Clinic, funded by the international Labor Organization, to help locally-based human rights lawyers to litigate, party-fashion, in the Inter-American Commission on Human Rights in Washington and the Inter-American Court of Human Rights in San Jose, Costa Rica. These 21 lawyers were from Honduras, Guatemala, El Salvador and Chiapas, Mexico. The principal distinguishing feature of this group is that each came to the program equipped with a real case file to litigate, looking to the project to teach them how to litigate.³⁹

Subsequent trainings were conducted in the home country, either by design or because, after September 11, the participant visa issue became too onerous and it was determined that the several remaining programs should be conducted abroad. One week or longer training sessions were held in Venezuela, for judges and public defenders, Guatemala, for professors and lawyers on the rules of evidence, Costa Rica, for attorneys planning to litigate in the Inter-American Court for Human Rights, and

Hammergren, Judicial Training and Justice Reform, USAID, Rule of Law Series, Pub. No. PN-ACD-021 (Washington, 1998).

³⁹Presentation of cases between Inter-American Court of Human Rights and the Inter-American Commission on Human Right is largely handled by the Center for Justice and International Law (CEJIL), a non-governmental organization of lawyers specializing in practice before the Inter-American Court and the Commission. CEJIL's advocacy is often disconnected from the client community from which the particular case emanates. An interesting corollary effect of this Inter-American clinic is that the lawyers are expected to return to their localities and to train their colleagues in *oralidad*, producing the so-called multiplier effect of the project. For further information on the CEJIL caseload, see <http://www.cejil.org>.

Chiapas, Mexico for human rights lawyers.⁴⁰

Methodology

The project objective started from the premise that countries in transition from the inquisitorial to the accusatorial model could learn from the structure and operation of the accusatory American trial. In no way, however, was homogeneity the goal of the programs, particularly given the diversity of the Latin American legal systems. The author approached the task with some misgivings since it is easier to admire the structure of the American system rather than its actual operation. One concern was that the programs would teach habits unique to the American way of trying cases and not suitable for adaptation. It was also of concern that the major weaknesses, some would say the essential dysfunction of the trial system (or at least the jury trial system) here would be patently obvious and lead to a wholesale rejection of what is probably a theoretically more desirable method– the party method. Finally, it was also clear that those components of the European model that had become co-extensive with Latin American tradition would also be preserved.⁴¹ To recognize and accept those traditions, whether or not they made sense in the American system or even if their purpose in the national system (as described by the students) was unclear, would also be a frequent challenge.

Resolved never to defend the indefensible and committed to helping Latin

⁴⁰During this same time period, non-Latin American projects included programs in San Sebastian, Spain at the Institute of Criminology, Pau, France at the law school, Genoa, Italy at the law school, and two in Palestine, the first at two Palestinian law schools and later with the entire Palestinian judiciary, with sessions in both Ramallah and in Gaza.

lawyers make this important transition with a sensitivity to their local custom and practice made the work easier as our sessions usually included an acknowledgment of the pertinent weaknesses of American practice and its irrelevance to many of the local issues faced by participating lawyers. Admitting the frailty of the notion of justice, that judges and juries everywhere can be biased, that there is sometimes a great distance between theory and practice and then sharing with the students a trial lawyer's natural cynicism about due process and the system meant to support it was actually a bonding experience that enabled instructor and student to communicate more frankly and directly.

Communicating with the trial lawyers is a predictable issue. As a long-time francophone and recent convert to Spanish, language proficiency was not a major barrier in Latin America, France, Spain, or the countries of North Africa. In other countries, consecutive translation was always available. Even with everyday fluency, a legal vocabulary is a separate vernacular requiring additional preparation.

Another challenge was the manner in which the classes were to be conducted. Most of the skills training models in American law schools are unknown to Latin American lawyers. Legal education, for the most part, consists of very large classes delivered in the lecture format.⁴² Seldom is there an opportunity for any student

⁴¹Field and Fisher, *supra*, note 5, p. 49.

⁴²The University of Buenos Aires offers a typical example. It is a public institution with a policy of open access, with no entrance requirements or national graduation standards. The student body numbers over 30,000 students. Dakolias, p. 19. For a broad discussion of the state of legal education in Latin America, see generally Alfredo Fuentes-Hernandez, *Globalization and Legal Education in Latin American: Issues for Law and Development in the 21st Century*, 21 Penn St. Int'l. L.Rev. 39 (2002).

participation, much less any dialogue, Socratic or otherwise, between teacher and student. Only recently have legal clinics begun to appear in Latin countries but, even then, the focus is seldom on litigation skills but rather on general client advocacy through letter writing, some investigation, accompaniment, etc. This situation is complicated by the fact that, in Latin law schools, there is very little emphasis on the needs of practice or procedural rules and virtually no instruction on *oralidad*.⁴³ Most law students in Latin America are offered only very theoretical or historical courses which emphasize jurisprudential development to the detriment of application.⁴⁴ Nor are there many specialty courses such as trial advocacy. In fact, the Latin American lawyer never attended law school as Americans know it. What is called law school is merely a “major” (sometimes a major that excludes all other disciplines) that one chooses for the undergraduate years. There is no post-graduate requirement and most law school professors are part-time due to the low salaries.⁴⁵

The standard method for teaching trial advocacy in American law schools is the simulation/critique method.⁴⁶ It was explained to the foreign attorneys that there would

⁴³Field and Fisher III, *supra*, note 5, p. 79 (commenting on the growing interest in Central American law schools in *oralidad*).

⁴⁴See Hendrix, Steven E., *Restructuring Legal Education in Guatemala: A model for law School Reform in Latin America*, Journal of Legal Education, Vol 54, Dec. 2004.

⁴⁵For a general discussion of the traditional mode of Latin legal education, see Joseph R. Thome, *Heading South but Looking North: Globalization and Law Reform in Latin America*, 2000 Wis.L.Rev. 691. See also Dakolias, A Strategy for Judicial Reform: The Experience in Latin America, 36 Virginia Journal of International Law 167 (Fall, 1995)

⁴⁶For an early seminal work on the simulation method, see Michael Meltsner and Philip G. Schrag, *Towards Simulation in Legal Education: An Experimental Course in Pre-Trial Litigation* (1975). See also Thomas F. Geraghty, *Foreword: Teaching Trial Advocacy in the 90s*

be very little lecture and that our basic routine would be to have the students prepare and then present the assigned trial exercises. After the presentation, there would be a critique and, time permitting, some discussion. The discussions would often center on a subject completely unfamiliar to them, for example, the notion of a theory of the case and how to weave it into the examination. In the selection of trial exercises, there was an emphasis placed on opening and closing statements, direct, cross and redirect examination. There was less of an emphasis on motions practice or other legal argument on the theory that those advocacy skills would be more familiar to the participating students, most of whom had made legal argument in court. A key part of the presentation was always a demonstration of how the particular exercise should be done. That demonstration could, depending on the skill level of the group, be done before or after the student exercises on the particular trial skill in question. Finding law students who spoke Spanish fluently enough to perform an opening or closing argument or a witness examination scripted by the author or to act as witnesses was not difficult.⁴⁷ The instructor's critique usually followed the recommended American pattern: usually no more than two points which draw specifically from what the student had said, no more than 3-4 minutes in length before moving on to the next student. Longer discussions, when necessary, were usually had at the end of the students' performances.⁴⁸

and Beyond, 66 Notre Dame L. Rev. 687 (1991).

⁴⁷In other countries, such as Italy or Palestine, the instructor did the demonstration which was then translated consecutively, sentence by sentence.

⁴⁸This teaching methodology is drawn principally from the "learn-by-doing" method initiated and fostered by the National Institute of Trial Advocacy. See Teachers' Manual for

Very little time was spent studying the recodification of procedure. That inquiry was left to the individuals, many of whom had already gone through training programs on the substance and some of the implications of the new procedures. Many had come to understand the daunting nature of learning the fundamentals of the party system.⁴⁹ Because they were accustomed only to “trial by affidavit,” they understood and accepted that *oralidad* training would be the principal objective of the program.⁵⁰

The decision was made to maximize the time each student spent in actual oral advocacy. In advance of the beginning of the course, the students were presented with normally three simulated case files fully translated into Spanish,⁵¹ complete with photos of real evidence, simulated police or accident reports, reports of experts, pretrial

Problems and Cases in Criminal Trial Advocacy, National Institute for Trial Advocacy (2nd Ed. 1989).

⁴⁹In Guatemala, for example, the enactment, in July, 1994, of the Criminal Procedures Code required sweeping changes in the key legal sector institutions: the court system (*Organismo Judicial*), the Prosecutors Office and the Public Defenders Office. Personnel from each of these institutions need to be trained in their individual and institutional roles under the new party system.

⁵⁰It should also be noted that considerably less time was spent on hearing procedures in civil cases. On one hand, criminal systems have been the priority of most countries, given the backlogs in cases and onerously long pretrial detention. Recodification of the law of civil procedure has, therefore, proceeded at a much slower pace than the criminal counterpart. The Civil Procedure Code of Costa Rica took effect in 1998 but has been very slow to implement. In Uruguay, where the Civil Code reform was accompanied by a tripling in the number of available and trained judges, the results have been much different. There is a model civil procedure code available to reform projects: the Model Ibero-American Code of Procedure. See Martha Field and William Fisher III, *supra*, note 5, at p. 32,40, 71.

⁵¹When translation is necessary, the case files have to be forwarded well in advance of the program. The Spanish translation was not always difficult, given the number of law students or cooperating Latin law professors who could either do or arrange to have the translating done. The problem was more severe in Palestine where the issue of translation into Arabic was more difficult.

statements, depositions, and the like. The simulated files distributed were much like the standard case files used in the trial advocacy course.⁵² Also distributed was an overview of the basic trial schematic explaining the order of the presentation of the opposing cases. In some cases, translated descriptive summaries giving an overview of the trial system, a description of the basic evidentiary objections, and a listing of possible pretrial motions were also handed out.

The instructor's preparation, in addition to a thorough understanding of the case files assigned and adequate training in the critique method, included a review of the recent codifications of the participating countries. That might include the new code of criminal procedure or legislation mandating a transition to the party system or modifications of the traditional system. The task is easier when one is seeking only to highlight differences in procedure. Since most Latin American countries are "code" countries and case precedent plays much less a role than in this country, there was seldom any case law to review.

The course's first session was usually devoted to an explanation of the trial phase and an abbreviated look at U.S. pretrial civil or criminal procedure. Those overviews were presented in a discussion format to draw out the differences and clarify several of the U.S. idiosyncracies, sometimes with computer graphics or handouts to help students visualize the problems. Each lawyer was then assigned to a party in one of the cases, instructed to review the entire file, and to be prepared to present whatever exercise was scheduled for the next class. Once assigned to a particular party, the

⁵²See, e.g., Thomas A. Mauet and Warren D. Wolfson, *Materials in Trial Advocacy: Problems and Cases*, 5th Ed. (2002).

student would advocate that party's interest for all of the exercises. Should there be time in the program to repeat the exercises, students would then be assigned to represent a different party in a different case. It was recommended that the participants work in small groups to better understand the file and to develop a theory of the case. It was also recommended that the students conduct small group oral "rehearsals" of the exercises. That particular recommendation was less likely to be followed unless student program assistants actually scheduled practice sessions.

At each class session, a prosecutor and defender or plaintiff and defendant from each of the "teams" assigned to a particular case would be designated to begin a series of repetitions of the assignment for each of the several case studies. One student in the group would perform, "opposing counsel" would be making objections and waiting to do the cross-examination or the responsive argument and other group members would observe, role-play the witness, or sit as the judge. The judge role-play was more valuable than the witness role-play as it gave the attorneys an opportunity to feel first-hand the frustration of the judge transitioning to the party model. If resources are available, outsiders are better suited to act as witnesses, simulating the equivocation, inconsistency and lack of articulation of a typical trial witness. The instructor's role, as it is in law school trial advocacy, was to observe but not to stop the exercise for any reason until ready for the critique. The students were told that they should attempt to resolve their own difficulties by staying in role and that conflicts were to be decided by the judge. Perhaps surprisingly, very few students had "breakdowns" in the middle of an exercise.

In the witness examination exercises, the students were to present direct, cross and redirect even though there is no provision in most Latin American procedural codes, even the new ones, for redirect. We did not conduct a simulated rebuttal case for the state or plaintiffs, again departing from actual practice but following the standard trial advocacy format. As a matter of the instructor's preference, two students would perform an exercise representing the opposing parties before each critique. Though the critique would not occur until there had been two performances, the critique itself was individualized. Exercises were limited in time so that each student assigned in a class ranging from 10-15 people could perform at least once per 2 or 2 1/2 hour class session. This posed a problem for these experienced lawyers who, if nothing else, were accustomed to making long speeches and then justifying themselves latter during the critique. It was often necessary for the instructor to cut short an examination or argument that was rambling.

At the conclusion of the course, it would be ideal to conduct an entire mock trial but time was truly of the essence in all but the first of these programs. That first program, three months in length, was luxuriously arranged so as to not only allow for full final mock trials, but also allow actual visits to civil and criminal trials and to dialogue with Hispanic judges and lawyers about the trial system. At the very least, time should be left to conduct an evaluation of the program and to give each of the students more personal, detailed feedback than can be done in the classroom atmosphere.

Nature of the Resistance

The mistakes made by the program lawyers very substantially mirrored the

mistakes that American law students are prone to make. To mention a few at the outset, it was very infrequent that arguments or witness examinations reflected a coherent theory of the case; the basic rules of cross-examination were violated with impunity, with particular note of the participants' insistence on asking open-ended questions on cross-examination; not understanding the importance of constructing a narrative so the trier of fact has the impression of being told a story (what American lawyers would call a jury-centered approach) or even the importance of artful presentational or rhetorical skills in general, many of the students would persist in reading their prepared scripts or using cross-examination as a fishing expedition where distracting and useless arguments with the witness were inevitable.

Normally, the judges showed an over-eagerness to speak and interrupt in court. Presumably, that was because they were accustomed to running the courtroom in their national systems. The practicing attorneys, whether prosecutors, defense lawyers or private practitioners, were often, at the outset, timid and reluctant. One of the many satisfactions with teaching this type of program is that, with time and practice, the lawyers relax, begin to find their "voice" in the courtroom. They become more engaged not only in understanding the orthodox techniques but also in developing their own sense of their personality in the courtroom. Opening and closing arguments were the easiest for the lawyers to simulate because of the similarity with legal argument.

The participants found it difficult to accept several of the fundamentals of the American trial system. Though there is no single component of our system that met with unanimous disapproval, it is possible to segregate out a number of the aspects of

the party trial system that met with the most resistance.

A) The jury system. Of the many unusual reactions, perhaps the most unanticipated was the almost complete rejection of the jury system.⁵³ The most common observation was that cases must be tried by “competent” people, trained in the law, and commanding of respect. A jury chosen at random from the citizenry would simply not be intelligent or learned enough to resolve complicated factual issues and would, therefore, operate to denigrate the whole system. The assurance that the jury would be instructed in the law and that their main job was to decide the contested facts as highlighted by the lawyers for both sides was of little consolation. Even lawyers from the most corrupt legal systems, where few judges would dream of contradicting the police or military authorities, and where one would think a randomly-selected jury would offer the best chance of an honest, unbiased result, even they were quick to condemn leaving so heavy a social responsibility on the shoulders of the average citizen. The most left-leaning of the lawyers, whom I had expected to side with the democracy-building tactic of letting the people decide important issues which affect the social fabric such as criminal conduct, argued that, ideally, members of the community should sit in judgement of each other but that the whole notion was contrary to their tradition and culture and that their countries were not yet ready for the citizen jury.

Given the high rates of illiteracy in so many Latin countries and the repressive state apparatus that would intimidate many jurors into coming to a government-desired result, it shouldn't be completely surprising that even habitually anti-government lawyers would think they had a better chance with a judge than with a jury. There was also the

perception, not altogether unreasonable, that, with juries, the premium on charlatanism by the trial lawyers would increase and performance, rather than the facts or a sense of justice, would dictate the outcome. They were not surprised to hear of the very low rates of actual juries in this country.⁵⁴ Their conclusion from the data was that American lawyers also shared their distrust of juries. Although that is sometimes the case, the primary reason for the low rate of juries in this country is the time and expense burden that juries place on an already over-loaded trial calendar in this, the most litigious of all countries.⁵⁵

B) The suggestibility of cross-examination. Cross-examination posed any number of both principled and pragmatic objections. The most common complaint was that, because leading questions are suggestive, the fairness of the proceeding is compromised. Lawyers given the normal latitude on cross were seen as exercising too much control over the witness and putting words into the witness' mouth. Indeed, substantial time was spent instructing students on the phrasing of questions so as to elicit one word responses as well as the development of the ability to cut off a witness who wishes to respond beyond the narrow parameters of the closed-ended question

⁵³None of the revised codes have, so far, recommended the adoption of the jury system.

⁵⁴Of the 98,786 tort cases that were terminated in U.S. District courts during fiscal years 2202 and 2003, 1,647 or 2% were decided by a bench or jury trial. Over 95% of all criminal cases are terminated by guilty pleas and fewer than 5% go to bench or jury trial. U.S.Department of Justice, Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2002. See generally, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J.Empirical Leg.Studies 459 (2004)

⁵⁵See Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 Duke L.J. 447, 456 (2004)(arguing that, in fact, Americans are not the most litigious of all people but rather that Americans tend more than any other

that was asked. It was also recommended, consistent with basic trial teaching orthodoxy, that the cross-examiner avoid asking any question to which he/she did not already know the answer and that certain areas of the direct testimony should just be avoided on cross where there was nothing to gain.⁵⁶

The notion that the cross-examiner would not review all of the testimony given on direct or that the lawyer would simply direct the witness' testimony to a few areas of weakness was foreign to most of them. As a result, there were many questions to the effect of "were you sure when you said on direct..." or "is it possible that you were mistaken when you said..." Coupled with the idea that a witness on cross-examination should not be allowed to give any extended answers, and that, in reality, it is the lawyer who is testifying by virtue of the weave of the questions, and, finally, that the witness on cross is merely confirming what the lawyer is actually stating (albeit in question form), the overall impression taken away by program participants was often that cross-examination seemed over-bearing and oppressive. In addition to those observations, many of the students also felt that witnesses in their countries would not have the temerity to stand their ground during an aggressive cross-examination and that a lot of "badgering" objections would be necessary.

C) The duty to investigate. The American lawyer is accustomed to accepting the duty to the client to begin the investigation and preparation for trial virtually at the moment of accepting the case. The project participants often found it difficult to accept

nationality to use litigation to solve social problems).

⁵⁶Thomas A. Mauet, *Trials: Strategy, Skills, and the New Powers of Persuasion*, (Aspen, 2005, Ch. 6.4, p. 217

that they should do an investigation independent of the police and prosecutorial authorities. They were taken aback when told that the party model demanded that each lawyer sift through the evidence, and then decide which evidence their client should present and which evidence is likely to be presented by the opponent. Moreover, the suggestion that the defense (in criminal cases) would race the prosecution to get statements from the witnesses was antithetical to their notion that the defense is not even activated until the investigation is complete, an arrest has been made and the prosecution has made a formal recommendation. Under the old model, the judge supervised the continuing investigation while the parties watched. Under the new systems, it is not specified in the codes exactly what procedures are to be followed and when those procedures are activated but it seemed the consensus that the duty to investigate transfers from the judge to the prosecution. In some countries, it seemed clear that the prosecution would supervise police activity. In others, the prosecution is left to review police evidence or to conduct a separate investigation. These provisions are unclear or nonexistent in most of the new codes but the participating attorneys were confident that the main effect of the transition would be to place investigation squarely under the jurisdiction of the prosecution in criminal cases.⁵⁷

The notion of becoming familiar with the opponent's case if for no other reason

⁵⁷See Sarles, footnote 11, *supra*. In the Italian conversion, one of the first transition to the accusatorial model amongst European countries, it evolved that the judge was gradually removed from any role in the gathering of evidence, other than to issue arrest, search or wiretapping warrants and overseeing the course of discovery. The prosecutor was thus left with almost unlimited powers in the crucial steps of preliminary investigation, thus breaking the traditional balance of power between the judge and prosecutor and leading many judges to feel like little more than a "notary." See Ennio Amodio, *supra*, note 21, p. 491-493.

than to be able to conduct a reasonable cross-examination was equally unfamiliar. If the prosecutor had already interviewed the witnesses and the police, there was no reason, argued the students, to conduct any separate defense interviews until the time of trial.

Even the criminal defense lawyers were reticent to doubt the credibility of the state's investigation or to agree that an in-depth challenge to all state evidence where possible is part of the professional duty. Because all agreed that the police would do little or nothing to flesh out the defense, the lawyers were more comfortable with the idea of simply developing a defense case, independent of the prosecution, and letting the prosecution put its case together without interference or even participation by the defense. Neither the criminal nor the civil lawyers had ever heard of the analogy between trial lawyers and architects: that both sides have the same raw materials but each side will build a different building. The tendency, rather, was to accept the building as presented by the plaintiff/prosecutor, to avoid attacking the edifice and merely to construct a defense which relied mainly on saying that the opposing case lacked credibility.

The prevailing legal culture in most Latin countries that the police or other paid investigators of the government do the investigating and that the lawyers have no role independent of those investigations poses serious issues for the future success of the party model in Latin America. In fact, criminal investigation is one of the most serious and neglected problems in most underdeveloped systems, with police having no access to forensic methods, relying primarily on witness statements⁵⁸ and the confession.⁵⁹

⁵⁸O'Shaughnessy and Dodson, *supra*, note 25, p. 11

The use of sophisticated and expensive investigatory techniques is just beginning and only in those countries willing to spend resources on the justice system and law enforcement. In some places, scientific and technical experts are beginning to be used in the justice system. To the participants, however, the idea that a lawyer could investigate complicated scientific matters and then effectively compete on cross-examination with a doctor, forensic specialist or other kind of expert was completely unknown to them.

D) The role of the judge. The role of the judge changes most dramatically in the changeover to the party system. The groups of judges in these programs found their new roles most unacceptable even though, under the new system, they retain the ultimate power of final decision at the trial level. They were very accustomed to being in charge of most aspects of the proceedings: calling whichever witnesses they wanted, in the order they chose, and then asking all or most of the questions. For a judge to be “reduced” to the role of referee, merely ruling on objections or legal points, seen but not heard until there is a problem, was perhaps too shocking for them to absorb in the few short weeks of the programs. Time and again, the simulations were derailed by a “judge” (whether in role or really a judge) who wanted to find out immediately whatever it was he or she wanted to know and was not willing to let the examinations take their course. In that situation, the judge would either insist on questioning, arguing with the lawyers, introducing into evidence items that neither counsel had submitted, or simply commenting very prematurely on credibility. It was common, for example, for a role-

⁵⁹Yamin and Noriega Garcia, *supra*, note 26, p. 31 (The Role of the Judiciary in the Perpetuation of Torture)

playing participant to rule on an objection or motion with commentary to the effect that he/she simply didn't believe the testimony. Whenever there was an objection, particularly a relevancy objection, the judges were likely to assess both the legal aspects and the credibility of the witness, or just simply offer their own opinion of what the witness was or was not saying. Since the jury system appears to one of the less feasible transplants to Latin systems, the judge (and any associate "assessors" or panels of judges as exist in some systems)⁶⁰ will remain the final determiners of credibility and, as such, will retain the ultimate decision-making power. Because judges are on a separate professional career track and because they are often the products of judicial-training institutions,⁶¹ it should be feasible to convince at least the next generation of the judiciary that the need in the transition is to adapt to a different but not inferior role.

One side effect of this problem of hyper-active judges was a high occurrence of argument among counsel and the bench. Rather than focus on the jury or on the flow of the case and the importance of telling a story, counsel very quickly would get engaged in heated debate or "legal" argument that could easily have been avoided or simply wasn't worth the disruption. In the author's experience, this is also typical of U.S. students.

E) Plea-bargaining. The debate over plea-bargaining was never-ending. In most Latin systems, a trial is eventually held in every case that isn't dismissed during

⁶⁰See e.g., the Criminal Procedures Code of Honduras, effective February, 2002, under which the oral, accusatorial system is to replace the written, inquisitorial system. Trials will be presided over by three judges, one at each state of the trial.

the investigation phase . That trial, however, may seem more like a guilty plea in that the judge will often review the written summarized evidence, not call any witnesses (the defendant in the criminal case is the most common witness), and restrict the lawyers to arguing matters pertaining to sentencing. A resolution of the matter pre-trial by conference between the attorneys, with or without the judge, was previously unknown, although there are now signs of change in a number of national systems that have converted to the party model.⁶² Under the old model, there are not two parties between whom there can be a negotiation and agreement. There is no tradition of compromising on the charge or on the facts of the case since the official duty is the discovery of the “truth,” meaning in this context that, even if the defendant admits guilt, the process goes on through a formal “trial” so as to properly apply the law to the facts and then to decide the sentence.⁶³ There is no recognition that the defense lawyer is an equal partner to the proceedings along with the judge and the “official” prosecutor. Even should there be some sort of agreement between the prosecutor and the defendant, there is, in the inquisitorial model, no provision that the judge should even hear of such a compromise much less be bound by it.

The students came quickly to the understanding that, without plea-bargaining, the American system would collapse under its own weight. When they heard that in excess of 90% of all our cases are decided by guilty plea or by settlement, our avowed

⁶¹Field and FisherIII, *supra*, note 5, p. 53.

⁶²Ennio Amodio, *supra*, note 21, p. 491. See also, Jonathan L. Hafetz, *supra*, note 2.

⁶³Steven E. Hendrix, *supra*, note 29, p. 390.

dedication to the jury system resonated less.⁶⁴ Several practical aspects of the guilty plea process struck many participants as clear violations of human rights. For example, it is common practice in the United States that, in exchange for a guilty plea, an indicted charge will be reduced. In some jurisdictions, depending on the local legal culture, the prosecutor may even threaten that, if the defendant chooses not to plead guilty, a new indictment can be sought which would, in fact, increase the severity of the charges to be faced.⁶⁵ That sort of a threat was seen as coercive to many participants and a threat to due process. Another practice that seemed anathema to them is the procedure sanctioned by the so-called *Alford*⁶⁶ plea, whereby a not-guilty person could nonetheless plead guilty to simply get out of pretrial incarceration and dispose of the charges. Many participants argued that the *Alford* plea is completely violative of every due process sense they had and renders the right to trial and the right to jury trial illusory. Finally, the idea that a prosecutor would over-charge a defendant to have more leeway in plea bargaining was also generally seen as unethical and anti-

⁶⁴Greg Berman, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 41 Am.Crim.L.Rev. 1313, 1317 (2004).

⁶⁵*Bodenkircher v. Hayes*, 434 U.S. 357 (1978). For a complete discussion of the implications of *Bodenkircher*, see William J. Stuntz, *Bodenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law*, Harvard Public Law Working Paper 120, available at <http://ssrn.com/abstract=854284>.

⁶⁶*North Carolina v. Alford*, 400 U.S. 25, 38, 91 S.Ct. 160, 168. Because the likelihood of conviction is high and the sanctions potentially severe, a defense lawyer may recommend a negotiated guilty plea even where the defendant maintains his/her innocence, as long as there is a “strong factual basis for the plea.” This procedure is used by defendants against whom the weight of the evidence is heavy, in spite of their innocence. They choose to minimize their exposure to the longer prison sentence should the trier of fact choose to believe the state’s case. The *Alford* plea is also used by defendant incarcerated pretrial who plead innocence but who eventually plead guilty if the sentence offered is probation and they can be released.

defendant.⁶⁷

F) Theory and theme of the case. For a number of reasons, the lawyers exhibited very limited capacity to develop a theory of the case⁶⁸ and even less willingness to see that task as key in a system focused on a credible narrative of events. In both argument and witness examination, they would project inconsistent or highly speculative defenses or spend large amounts of time and effort solidifying a key point of the opponent as a side effect of having pounced on a clearly collateral inconsistency. The notion that a party must be able to explain their case in a short two-sentence summation was widely resisted. Though the development of a theme⁶⁹ to use in opening statements and closing arguments was more popular and seen by the

⁶⁷Note that, in various European countries, the notion of plea-bargaining has taken hold, albeit with important differences from the U.S. system. Nonetheless, one commentator see plea-bargaining as the “Trojan horse” of the adversarial system. See Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int’l. L.J. 1,35 (2004). In Latin America, there are examples in criminal procedure where there may be a “consensual” termination to the proceeding. For those provisions in Guatemala, see Alberto Bovino, *Temas de Derecho Procesal Penal Guatemalteco* 141-164 (1996). In Costa Rica, see COD.PROC. PEN, arts. 373-375. In Argentina, under the terms of the *procedimiento abreviado*, a prosecutor and defense lawyer can agree as to a sentence if not greater than six years of imprisonment and conditioned on the defendant’s full admission to the indictment. The trial court may still disagree and acquit but may not sentence the defendant to longer than the agreed-upon term. COD.PROC>PEN. Arti. 431 *bis* 1-5.

⁶⁸The expression “theory of the case” is used here to describe that set of facts which, when combined, allows the advocate to tell the fact-finder a coherent and consistent story. As Mauet puts it, is is “simply a logical, persuasive story of ‘what really happened....’ your theory of the case must combine your undisputed evidence and your version of the disputed evidence that you will present in storytelling form at trial.” Thomas A. Mauet, *Trial Techniques* (6th Ed. 2002), p. 507.

⁶⁹By theme, trial lawyers usually mean a short *leit motif* or refrain that summarizes the theory and can be repeated often enough so as to impose itself on the consciousness of the fact-finder. Mauet, *Id.* at 509

participants as perhaps an amusing rhetorical device, there was a general conclusion that a theme would not be usable before a judicial panel trier of fact in Latin America.

As to the theory and theme of the case, it is clear that the nature of legal argument in Latin countries is to paint with a broad brushstroke. The students, whether judges or simply lawyers, had very little eye for the kind of minute detail which, when exploited, can distinguish a guilty from a non-guilty, liability from non-liability.

G) The Presentation of “Novel” Types of Evidence. Least surprising of all was the students’ reluctance to see video and computer evidence or other types of demonstrative tools as useful or likely to be used in the presentation of the case. The threshold issue is, of course, the resources to assemble these testimonial aids. It was not difficult for the participants, whether they worked in under-funded prosecution or defense office or on their own in a small office, to predict that many years will pass before the technology of the American courtroom appears in Latin America.⁷⁰ Beyond the resources issue, it was feared that some of the newer types of evidence would deceive the trier of fact and therefore be prejudicial. There was widespread distrust of computerized evidence, such as accident reconstructions,⁷¹ With some degree of indignation, one student said that computers should never be allowed to replace people which, ultimately, is perhaps the direction of U.S. litigation. The reluctance did not apply to forensic evidence, maps or charts, photographs or video interviews. Since it

⁷⁰That may certainly be true in the criminal system where most defendants are indigent and public budgets are minimal. Power-point presentations, for example, have already begun to appear in business-related litigation in some parts of Latin America.

⁷¹For a broad description of the technology and the costs, see generally, Report of the Corporate Counsel Section of the New York State Bar Association, *Legal Development: Report*

appears that there is very little precedent for using even the most common types of demonstratives in Latin cases, the discussion often centered on issues of admissibility and, in general, convincing the judge to allow the evidence to be used.

One likely explanation for the hesitation to see technology in the courtroom as an important advance is perhaps the fact that trial lawyers in Latin America (and elsewhere) have not traditionally had the latitude in the presentation of evidence that has been enjoyed by American lawyers. Given the procedural strait-jacket of the inquisitorial model and its restrictions on the role of the lawyers, Latin American attorneys may feel that they will not be allowed to present newer forms of evidence, demonstrative or otherwise, in courtrooms where judges are accustomed to trial by affidavit. All agreed that the party attorney would need to request permission of the judge to introduce a new form of evidence, whereas the U.S. trial lawyer can more confident that a foundation of reliability can be laid.

Future

Fairness to the litigants is what should be at the heart of the changes now sweeping through Latin American trial systems. In a hitherto closed and inaccessible process, the real parties in interest are often left with a sense of lack of due process, a sense that they have not received their “day in court.” Indeed, they have not in that they had very little control over the investigation, presentation, or analysis of the case. The change to the party system lets the litigants (with the assistance of counsel) become a more integral part of the proceedings. The trial phase should show the most dramatic transformation, with the counsel for the litigants now in charge of the

presentation of the case, with the broadening of live witness testimony, the confrontation inherent to cross-examination, and the right to present the evidence, including evidence in its newer forms, according to the trial plan of the party.

The oral hearing model should also encourage judges to not only be more efficient but also more open and transparent in how they decide and in how they manage the proceedings. The dynamic of the trial process should also change dramatically. When there are open hearings where the parties are actually present and offering testimony, where lawyers and judges are interacting not only over procedure but also over the evidence, the *primera instancia*, will seem much more about real problems involving real people, rather than a stack of written materials to be waded through, summarized, and digested.⁷²

American lawyers are comfortable with having the lawyers develop and present the evidence favorable to the client and letting the opponent do the same. We recoil at the notion that the judge would be the primary actor, calling the witnesses, controlling the presentation of evidence, and commenting on the strength of the case as the trial unfolds. Particularly in countries where the neutrality or integrity of the judiciary is suspect, *oralidad* and the requirement that the case be decided on the evidence presented by the parties rather than the evidence reviewed by the judge in some closed proceeding seems a step forward in inducing judicial accountability for decisions. Forced to make decisions based upon a record that was available for all to see in a public trial will render the legal system more accessible and democratic.

The transition will also improve the quality of the trial bar and strengthen the

ability of lawyers to be truly effective advocates. The ability to investigate and have access to the evidence will encourage a much more proactive version of lawyering, empowering attorneys to get fully involved in the case at a much earlier stage and to therefore reliably predict to their clients what the evidence will be at trial and the prospects for success. It will also help lawyers to develop the eye for detail and contradiction that is not taught in Latin American law schools and cannot be developed without an opportunity to truly challenge the evidence.

Oralidad will create a whole new subclass of attorneys known for their courtroom brilliance, their ability to creatively present a case and to attack the case against them. More importantly, any lawyer trained in the party system should eventually feel the interest of the client, rich or poor, powerful or powerless, can be leveraged onto an even playing field where the primary focus of the case, by virtue of the attorney's ability to examine, cross-examine, and argue, will be on the rights of all the parties, not just those favored by the judge.

One can only hope that once the reins of management of the case are loosened from the grip of the trial judge, that the opposing parties, in the spirit of civil but hard-fought combat, will take the proceedings much more into the realm of the everyday and trials and court hearings will become more accessible to the understanding of the non-lawyer. Judges, as the ultimate decision-makers, should not see their management roles as diminished but rather redirected. The demystification of the trial process should be an integral component in maximizing the impetus to use the courts.

The purpose of this article has been to anticipate some of the problems that will

⁷²See discussion, Martha Field and William W. Fisher III, *supra*, note 5 at p. 24.

be brought on by the change in trial systems. Those changes will engender a new set of problems about which trial lawyers will soon be making demands for change. One of those problem areas concerns rules of evidence. The author has participated in two projects to develop rules of evidence and discovery, it having become obvious that trial procedures alone were not sufficient to complete the transition. The need for rules of evidence should be clear. There are quite simply no well-accepted rules that govern the admissibility of evidence, including even generally agreed-upon concepts of relevance. For example, the trial lawyers and the judges in the programs, whether real or in-role, would quickly seek to introduce the criminal defendant's character or past encounters with the law, regardless of when they occurred, their seriousness, whether they resulted in a conviction, or whether the defendant had testified.⁷³ For another, hearsay was occasionally objected to but on a relevance basis. It was surprising to learn that the Spanish word for hearsay⁷⁴ is not commonly used in Latin courts and that there is no general rule for admissibility of hearsay, much less for exceptions. As a third example, judges will commonly dismiss witnesses as incompetent on any number and variety of grounds such as children under sixteen, persons with disabilities such as blindness, all extended family relatives, and the like.⁷⁵

Some of this lack of uniformity of practice is understandable, given that many of the federal and state rules of evidence in the U.S. are predicated on a need to protect juries from prejudicial or irrelevant information. In a system where juries are unknown

⁷³See Federal Rule of Evidence 609(a)(1) and (2).

⁷⁴*De oídas* or, alternatively, *pruebas de referencia*

⁷⁵Martha Field and William W. Fisher III, *supra*, note 5, p. 27

but where judges are assumed, as in the rest of the world, to be fair and impartial, there is theoretically less need to filter the evidence since a judge is less likely to be prejudiced and more likely to give the evidence the weight it deserves. It is also probably true that, as more than one participant observed, we have overly complicated questions of admissibility to the point where there is little internal coherence to our theory that juries are competent on some matters and not so competent on others. Nonetheless, even in a system where the judge and assessors or rapporteurs are the final decision-makers, there is a need for uniformity of practice on the admissibility of evidence. There have been a few initiatives toward codifications of evidence rules in Latin America that are, as yet, incipient.⁷⁶

Equally clear is the need for more comprehensive rules of discovery. There are precious few discovery devices available to attorneys in either the pretrial or trial phases. Copies of the complaint and statement of the defendant are commonly available but there is normally no provision for access to scientific evidence, statements of witnesses, interrogatories, depositions, and the like.⁷⁷ One concern, of course, would be that new rules of discovery could be used to impede and delay the trial process, much as occurs in the United States when the discovery process is abused. Another concern is that any inequality between the parties could be exploited during discovery, disadvantaging the party with fewer resources.

⁷⁶Most projects in this regard are at the conference stage. For example, the author was privileged to participate in the First Congress for Jurists and University Professors on the Law of Evidence, held in Guatemala City in 1997.

⁷⁷See Martha A. Field and William W. Fisher, III, *Legal Reform in Central America*, “Necessary Civil Procedure Reforms within Either Traditional or Hearing-Based systems, ch.4

If one can generalize in this evolving situation, it seems clear that, with the party system, there are effects beyond the orality, the reduced role of the judge, and the increased role of the lawyers as architects of the cases presented. When lawyers can take a much more aggressive role on behalf of their clients, even if cases do not come to trial more quickly,⁷⁸ the trials themselves take place much more quickly and therefore are more focused on the key points.⁷⁹ When witnesses are actually called and examinations conducted, the trial becomes more transparent than it was when the review of affidavits was the key judicial function.

Obviously, the greatest variable in assessing the potential for success of the changeover to the party system is the political climate in each country. As elsewhere, the passing of a new procedure code or even new rules of evidence and discovery does little to achieve real reform in dysfunctional or corrupt legal systems. From the apex of government structure to the lowest level of political and legal organization, the political will to change as part of the democratization process must be manifested in more than just words. The feedback received from the former students informs that many judges have refused to changeover or that they merely give lip service to the new models.

Corruption is, of course, another problem that cuts across all procedural models throughout the world, threatening to undermine any reform project. Given the widespread perception of the legal system as corrupt and the few resources expended

⁷⁸It appears that, under the accusatorial system, cases are getting to the trial courtroom in much shorter time which has the obvious advantage that, in criminal cases, presumed innocent defendants are spending much less time incarcerated prior to trial. See Peter J. Messitte, *Expanding the Rule of Law: Judicial Reform in Central Europe & Latin America*, 4 Wash. U. Global Studies L.Rev. 617, 618 (2005) (quoting Steven Hendrix).

in most Latin countries on public education, it will be difficult to combat the public perception of judicial corruption, unfairness, and lack of independence. With continued ethics training at judicial and prosecutorial schools, with appointment of judges regardless of political connections, with heightened visibility through media and technology of the conduct of trials, with strong disciplinary actions against the corrupt, and with the ability of lawyers to protest in open court any perceived bias of the bench, there is at least the potential for reform.

The prospects for a short-term changeover period with rapid implementation of the new procedures are not good. At issue is not only the procedural and statutory reform but also a complete overhaul of the culture of the courtroom and the role of lawyers. Attempting to train present judges and lawyers will have some usefulness in the transformation but, on the whole, the best prospects for the legal reform movement lie within the law schools. The training of the professors and the revision of the curriculum are key components in assessing the long-term prospects for the transition. If law professors can be persuaded to teach practice as well as theory and if the course offerings, both substantively and methodologically, can be modified to reflect the needs of the practitioner, then the next generation will learn not only the doctrinal law of the party system, both substantively and procedurally, but also the practice skills that are needed to implement that system.

As deficient as the U.S. system may be in so many practical ways, the North American model represents probably the best structural framework of the party system. Even if it weren't, Latin American countries would be tempted to emulate the U.S. legal

⁷⁹*Id.* at 618.

infrastructure and procedures simply because globalization has made the U.S. a reference point for most legal and economic initiatives. U.S. government resources spent on legal reform in Latin America are well-spent, not only because the result is more American-friendly but also because the people of the region are well-served. USAID and other international organizations in which the U.S. plays a major role such as the Organization of American States, the Inter-American Development Bank, and the World Bank should consider expanding their efforts help these reforms sift to the base of each individual Latin country involved in the transition.